

# Powers and Authorities of an Immigration Judge

## I. General Overview

- a. An Immigration Judge is defined in INA section 101(b)(4), as “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240.” In other words, an Immigration Judge is a Department of Justice attorney who acts under the authority of the Attorney General. The powers and authority of the office are limited to those which have been designated to the Attorney General by statute (as interpreted by case-law) and then have been assigned to Immigration Judges by statute or regulation.

- b. **Practice tip:** (b) (5)



- i. More information on the powers and authorities delegated to the Secretary of Homeland Security and the Attorney General is available in INA section 103. In general, the authority of the Attorney General includes “such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.”
- c. This outline provides only a general overview of the powers and authorities of an Immigration Judge.

## II. Sources of Authority

- a. INA section 240(b)(1)
  - i. “The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”

This is a general summary prepared solely for instructional purposes and does not constitute a complete statement of the law. This document should not be relied on as legal advice. Any individual seeking information regarding their legal rights should consult with an experienced immigration attorney.

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- ii. In order to fulfill these obligations, an Immigration Judge also has associated powers. For instance, an Immigration Judge may:
    - 1. Rule on objections and issues of admissibility regarding documentary evidence and testimony;
    - 2. Accept witnesses as experts;
    - 3. Accept proffers of evidence
  - iii. This section sets forth the authority of the Immigration Judge in removal proceedings. However, these powers are also available in exclusion, deportation, and asylum- or withholding-only proceedings.
  - iv. **Practice tip:** (b) (5) [REDACTED]
  - v. An Immigration Judge may set reasonable deadlines for the submission of evidence, may extend deadlines, and may continue proceedings for “good cause” (which may include the filing of additional evidence or awaiting resolution of collateral issues). *See* 8 C.F.R. §§ 1003.31(c), 1003.29
  - vi. At present, there are no final regulations authorizing an Immigration Judge to issue contempt rulings with sanctions. Work on these regulations remains pending with the agency. In the event that an individual or entity fails to comply with a subpoena, an Immigration Judge may contact the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and seek an enforcement order from the District Court. *See* 8 C.F.R. § 1003.35(b)(6) for more information regarding this procedure.
  - vii. *See also* 8 C.F.R. §§ 1003.10 and 1240.1 for more information on the general powers and authorities of an Immigration Judge
- b. INA section 240(c)(1)(A)
- i. An Immigration Judge “shall decide whether an alien is removable from the United States [...] based only on the evidence produced at the hearing.”
  - ii. Ordinarily, a decision regarding removability must be based solely on evidence presented by the parties.
  - iii. **Practice tip:** (b) (5) [REDACTED]

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(b) (5)




### EXAMPLE

During an asylum proceeding, an Immigration Judge asks the parties if they wish her to take administrative notice of the contents of the most recent country conditions reports from the Department of State. The parties do not object, and the Immigration Judge is free to independently obtain the reports and consider their contents as if they had been entered into the record by the parties.

Later, while assisting with a subsequent written decision, the Immigration Judge's judicial law clerk discovers an on-point report created by the UNHCR. It probably would be inappropriate to take administrative notice of the contents of that report without prior notice to the parties and an opportunity for them to object.

- c. INA section 240(c)(7)
  - i. An Immigration Judge may reopen the record to permit additional evidence. The Immigration Judge may adjudicate motions to reopen filed by the parties, which are ordinarily subject to time and/or numerical limitations. Alternatively, 8 C.F.R. § 1003.23(b)(1) permits an Immigration Judge to reopen proceedings sua sponte "at any time."
  - ii. An Immigration Judge may also reconsider any decision he or she entered in removal proceedings if there was an error of law or fact in the prior decision. This may be upon the motion of a party, in which case there are again time and numerical limitations, or it may be sua sponte.

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- d. INA section 236
  - i. An Immigration Judge “[e]xcept as provided in subsection (c) of this section” may re-determine a DHS decision to “continue to detain” an alien or to release the alien on bond or with a conditional parole.
  - ii. More information regarding the precise powers and authorities in bond proceedings is available in your bond training.
  - iii. **Practice tip:** (b) (5) 
  - iv. *See also* 8 C.F.R. § 1003.19
- e. 8 C.F.R. § 1240.1
  - i. This regulation explicitly identifies a number of powers held by Immigration Judges. These include, for example:
    - 1. The authority to enter orders of removal;
    - 2. The authority to adjudicate certain forms of relief applications, including:
      - asylum applications submitted under INA section 208;
      - certain waiver applications submitted under INA sections 212 or 237;
      - cancellation of removal applications under section 240A;
      - voluntary departure applications under section 240B;
      - adjustment of status under 245;
      - records of admission for permanent resident under 249;
      - and NACARA relief under section 202 of Pub. Law No. 105-100
    - 3. The power to withhold removal under section 241(a)(5) of the Act or under the Convention Against Torture regulations is listed separately, because these are not considered forms of relief from removal. Remember a removal order is entered in such cases, and then removal is withheld or deferred.
    - 4. An Immigration Judge may also permit an arriving alien to withdrawn his or her application for admission, if the alien has the means and intent to immediately depart and if permitting the withdrawal would be in the “interests of justice.” For more information, see 8 C.F.R. § 1240.1(d)

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### EXAMPLE

An Immigration Judge does not have authority to adjudicate family-based visa petitions.

However, an Immigration Judge does have the authority to determine whether good cause is shown for a continuance, including a continuance to await adjudication of a family-based visa petition. Per the Board decision in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), one of the factors for determining whether there is “good cause” for such a continuance is “whether the underlying visa petition is prima facie approvable.”

Therefore, an Immigration Judge may need to examine the alien’s submission to Citizenship and Immigration Services, but only for the purposes of adjudicating the continuance and not to make legal conclusions regarding the substantive merits of the visa petition.

- ii. Finally, 8 C.F.R. § 1240.1(a)(4) permits an Immigration Judge to “take any other action consistent with applicable law and regulations as may be appropriate.”